



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, WA 98101

August 10, 2005

Via FAX: (503) 224-6148
and First Class Mail

Reply To
Attn Of: ORC-158

Clarence Greenwood, Esq.
Black Helterline
1900 Fox Tower
805 Southwest Broadway
Portland, OR 97205-3359

Re: Robert Kerivan and Bridgeview Vineyards, Inc.
EPA Docket No. CWA-10-2003-0012

Dear Mr. Greenwood:

Enclosed is a proposed Consent Agreement and Final Order (CAFO) for your review and comment. Please contact me if you have any questions about the terms and conditions of the CAFO or if you have any suggested revisions.

If the document meets with your approval as written, then please sign the CAFO or have it signed and returned to me. After I have signed the Consent Agreement section of the CAFO, a copy of the document will be mailed by certified mail to each of the persons who submitted written comments to EPA listed in Exhibit A to this CAFO. We will then need to wait at least 30 days from the commenter's receipt of the CAFO before we can forward it to the Regional Administrator for signature. But if any of the commenters petition the Regional Administrator to set aside the consent agreement, then EPA will have to follow the procedures established in 40 C.F.R. § 22.45(c)(4) to address the petition.

Briefly, responding to comments made in your August 5th email message to me concerning applicability of any of the CWA 404(f) exemptions to the work that was done, there has never been any evidence presented to EPA to support a finding that any of the exemptions apply to the unauthorized work that was conducted by your clients including the CWA Section 404(f)(1)(E) exemption for the purpose of construction or maintenance of farm roads. Diverting the flow of Sucker Creek by constructing a "barb" is not farm road maintenance even when it may have a secondary effect of preventing bank erosion near a farm road. You've also presented no evidence that best management practices were used during the barb construction to assure that flow and circulation patterns and chemical and biological characteristics of the creek were not impaired as required under CWA Section 404(f)(1)(E) and 40 C.F.R. § 232.3(c)(6). Nor have you established that there was emergency reconstruction of recently

damaged parts of a currently serviceable structure that occurred within a reasonable period of time after the damage occurred and did not modify the character, scope or size of the original fill design as required under CWA Section 404(f)(1)(B) and 40 C.F.R. § 232.3(c)(2). Nor have you established that all of the requirements to qualify for Nationwide Permit 13 were met, not just those requirements you consider to be “substantive requirements.”

The fact that EPA allowed your client to retain some fill material was not because EPA agreed with your assessment that the barb construction qualified as emergency construction for bank protection, rather, it acknowledged that some of the fill could potentially be used when and if your clients completed the permitting process and that taking materials into and out of the creek could potentially be more harmful to the fish than letting some of the material remain.

As indicated in my July 28th email message to you, the structure remains unauthorized until a permit is issued for it by the Corps. A Corps request that your client comply with its requirement that plans be presented in a size that is easily reproducible do not strike EPA as being absurd. We recommend that you continue to work with the Corps to obtain the necessary permits to authorize the bank erosion protection activities that your clients seek. This clarifies the background for EPA’s acceptance of your settlement proposal.

Please contact me with any questions concerning the draft CAFO. I will be out of the office from August 11 through August 17th and will return to the office on August 18th. I appreciate your help in attempting to resolve this case.

Sincerely,

Deborah E. Hilsman
Assistant Regional Counsel

cc: Yvonne Vallette, EPA OOO